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SUPREME COURT TO HEAR CHALLENGE TO THE CONSTITUTIONALITY OF DETENTION UNDER INA § 236(C)

On June 28, 2002, the Supreme Court granted the government's *petition for certiorari* filed in *Kim v. Ziglar*, 276 F.3d 523 (9th Cir.) *cert. granted sub nom.*, ***Charles-Demore v. Kim***, __U.S.L.W.__, U.S. Jan. 28, 2002)(No. 01-1491). The question presented to the Court by the Solicitor General is whether the respondent's mandatory detention under INA § 236(c)(1), 8 U.S.C § 1226(c), violates the Due Process Clause of the Fifth Amendment, where the respondent was convicted of an aggravated felony after his admission into the United States.

The question presented to the Court by the Solicitor General is whether the respondent's mandatory detention under INA § 236(c)(1), violates the Due Process Clause of the Fifth Amendment.

Section 236(c)(1) of the INA requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 236(c)(2) prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present in this case.

Hyung Joon Kim, the respondent, entered the United States legally in 1984 and became a lawful permanent resident in 1986, when he was eight years old. On July 8, 1996, when he was 18 years old, the respondent was convicted in California state court of first degree burglary. In 1997, he was convicted of "petty theft with priors," in violation of California laws and received a sentence of three years' imprisonment. In December 1988, while respondent was serving his state sentence, the INS commenced removal proceedings on the basis that he had been convicted of an aggravated felony. After respondent was released from prison, the INS took him into custody, and in light of the mandatory nature of INA § 236(c), declined to release him on bond.

The respondent then filed a habeas corpus petition under 28 U.S.C. § 2241. The district court held that INA § 236(c) was

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SUPREME COURT BLOCKS ORDER TO OPEN IMMIGRATION HEARINGS

On June 28, 2002, the Supreme Court granted a stay pending appeal of an order entered in ***North Jersey Media Group, Inc. v. Ashcroft*** (D.N.J May 28, 2002), which had enjoined the enforcement of an EOIR directive closing to the public removal proceedings involving September 11 detainees.

The district court had preliminarily enjoined further enforcement of Chief Immigration Judge Creppy's September 21, 2001, directive to all immigration judges closing immigration proceedings involving September 11 interest aliens to the public and press. The court's order had further enjoined the Department from closing any immigration proceedings without case specific findings by immigration judges pursuant to 8 C.F.R. § 3.27. Relying on Supreme Court de-

(Continued on page 2)

NINTH CIRCUIT ISSUES ORDER GOVERNING MOTIONS FOR STAY OF DEPORTATION

On July 1, 2002, the Ninth Circuit issued General Order 6.4(c) governing motions for stay of deportation in petitions for review. The Order codifies the Ninth Circuit's decision in *DeLeon v. INS*, 115 F.3d 643 (9th Cir. 1997). In that case, the court held that a final order of deportation or removal is automatically temporarily stayed upon the filing of a motion or request for stay of deportation or removal in a petition for review of such an order. The Order provides, *inter alia*, that the respondent INS will have 42 days to respond to a motion for stay and that the administrative record would be due with the response. The Order became effective on July 1, 2002. The full text of General Order 6.4(c) is reproduced at page 5, *infra*.

Highlights Inside

Supreme Court To Hear 236(c) Detention Case

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unconstitutional on its face and ordered an individualized bond hearing. The government appealed. The Ninth Circuit held that § 236(c) as applied to permanent resident aliens violated substantive due process. The court reasoned that detention would be permissible only if the government establishes a "special justification" that outweighs the lawful permanent resident's liberty interest. The court, however, it did not specifically affirm the district court's facial invalidation of § 236(c).

In the *petition for certiorari* the Solicitor General contended that Supreme Court review was warranted "to ensure a prompt and definitive resolution of a constitutional issue on which the circuit courts have disagreed." Moreover, the Solicitor General explained to the Court that review was warranted because the enforceability of INA § 236(c) "has great practical importance for the administration of the immigration laws." In particular, he noted that since the enactment of IIRIRA in 1996, the INS has detained more than 75,000 aliens pursuant to the requirements of section 236(c).

On the merits, the Solicitor General argues that the Ninth Circuit's opinion was incorrect, because, *inter alia*, it "straightforwardly substituted its own policy judgment for the considered conclusion of the political Branches." "Those aliens have been convicted of a particular crime that Congress specifically enumerated, and they have enjoyed full due process protections in connections with those convictions. Thus, criminal aliens have *already* been accorded the opportunity for an individualized hearing on the essential predicate for their detention under Section 1226(c)" contends the Solicitor General.

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SUPREME COURT STAYS ORDER TO OPEN IMMIGRATION HEARINGS IN 9/11 INTEREST CASES

(Continued from page 1)

cisions construing the public's First Amendment access rights to criminal judicial proceedings and Third Circuit cases extending that jurisprudence to civil judicial and a few other nonfederal administrative proceedings, the district court had concluded that the public and press have a qualified right of access to immigration removal proceedings. The court further concluded that the closed hearing directive infringed that access right because it did not withstand the strict scrutiny which applies in the context of criminal and civil judicial proceedings.

On May 30, 2002, the government noticed its appeal from the district court's order, sought clarification of the order by the district court, and moved for a stay of the order pending appeal. On June 5, 2002, the district court denied the government's stay motion and clarified that the preliminary injunction was nationwide but limited to the Creppy directive. On June 6, 2002, the government sought an emergency stay pending appeal in the Third Circuit. On June 17, 2002, the Third Circuit denied the stay motion but granted the government's request for an expedited briefing schedule. Four days later, on June 21, 2002, the Solicitor General filed an application for a stay pending appeal in the United States Supreme Court.

In the application for a stay, the Solicitor General said that this was "an extraordinary case, touching on the Nation's very ability to defend itself against the continuing threat of hostile attack from myriad and unknown sources." The Solicitor General contended that if the immigration "proceedings are opened to the public during the critical phase of the current urgent threat to national security, terrorists organizations will have direct access to information about the government's ongoing investigation, including the identity of detainees, evidence of their links to terrorism, insights into the evidence that the government has and does not have, and other leads that may well not be discernable by the press, individual immigration judges, or even the individual aliens concerned." "Disclosure of this information," further argued the Solicitor General, "could cause irreparable harm to the public safety, national security, and critically important ongoing criminal investigation. Once breached, this confidentiality could never be restored by the courts."

This is "an extraordinary case, touching on the Nation's very ability to defend itself against the continuing threat of hostile attack from myriad and unknown sources."

On the underlying merits of the district court's opinion, the Solicitor General argued that there is no general First Amendment right of access in administrative proceedings, much less immigration proceedings. Alternatively, even if First Amendments interests are implicated by the Creppy directive, the Solicitor General contended that the directive satisfies constitutional scrutiny.

In granting the stay, the Supreme Court ordered that the preliminary injunction entered on May 28, 2002, is stayed pending final disposition of the government's appeal of that injunction to the Third Circuit. The order marks the Supreme Court's first action in the ongoing terrorism investigation.

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Contributions To The ILB Are Welcomed!

THE BORDER SECURITY AND VISA ENTRY REFORM ACT

On May 14, 2002, President Bush signed the Border Security and Visa Entry Reform Act, stating, "We must know who's coming into our country and why they're coming. We must know what our visitors are doing and when they leave . . . It's knowledge necessary to make our homeland more secure." The bill, originally introduced shortly after the September 11th attacks, was stalled in Congress due to efforts on the part of the administration to include an extension of INA § 245 (i), the adjustment of status provision. Once § 245(i) was dropped, however, the bill passed fairly quickly.

"We must know who's coming into our country and why they're coming. We must know what our visitors are doing and when they leave."

Staffing and Technology Upgrade Authorizations

Among its major provisions, the Act authorizes the hiring of at least 400 new, full-time INS inspectors, investigators, and support staff during fiscal years 2003 through 2006, subject to the availability of appropriations. This is in addition to staff increases mandated by the USA PATRIOT Act of 2001. The law will increase salaries for Border Patrol agents, inspectors, and inspections assistants, and provide training for those individuals, and for consular officers and diplomatic security agents. Technology improvements to enhance border security are mandated in a number of areas, including computer security, information technology development, and infrastructural support, to improve and expand pre-enrollment and pre-clearance programs. Other advances, such as machine-readable visas (MRV's) with biometric and document authentication identifiers will become standard as of October 26, 2004. The appropriation requested for these technology improvements is $150 million.

Interagency Information Sharing

Recognizing the necessity for interagency information sharing, the Act establishes interim measures to facilitate information exchange between federal law enforcement and intelligence agencies, the INS, and the Department of State, and requires the President to develop the "Chimera system," a comprehensive inter-operable law enforcement and intelligence data system with name-matching capacity, which can be easily accessed by consular officers, Federal officials dealing with admission and deportation, and Federal law enforcement and intelligence agencies. A Commission on Interoperable Data Sharing will be established to monitor protections against unauthorized use of database information, as well as providing general oversight and periodic reports to Congress.

Provisions Relating to Visas

To facilitate the entry of visa holders into the United States, an electronic version of each visa file will be made available to immigration inspectors at points of entry prior to an alien's arrival, and will be maintained in an integrated entry and exit database. Furthermore, all countries participating in the Visa Waiver Program (VWP) must be prepared to issue only machine-readable, tamper-resistant entry and exit documents by October 26, 2004. Review of VWP countries will take place every two years, rather than every 5 years, and these countries must promptly report any lost or stolen blank passports in order to maintain their VWP status. This information will be entered into a tracking system tied to the overall Chimera system discussed above. Additionally, the Act creates a foreign student monitoring program, tracking student visa applicants from the point of acceptance by an approved higher education institution or exchange program through entry into the country and enrollment, requiring the institutions to report any student visa holder who does not register within the allotted time period.

One of the more controversial sections of the Act restricts the issuance of non-immigrant visas to citizens of countries designated as state sponsors of terrorism, defined as "any country the government of which has been determined by the Secretary of State . . . to have repeatedly provided support for acts of international terrorism." Such applicants will not be able to obtain visas unless the Secretary of State determines they do not demonstrate a threat to U.S. national security. This provision concerns a number of observers, who wonder how it will be implemented.

Additional Security Measures

The Act eliminates the requirement that passengers arriving on international flights be cleared within 45 minutes, while advocating adequate staffing so that the process can generally be completed within that time period. Additionally, the INA § 231 passenger manifest requirements for commercial vessels and aircraft arriving and departing from the United States have been strengthened.

Finally, additional security measures include establishment of terrorism outlook committees at all foreign missions, charged with identifying and developing information regarding known and potential terrorists, entering it into appropriate databases, and disseminating it to the appropriate immigration officials. Creation of a North American National Security Program involving the United States, Canada, and Mexico, as well as other cooperative initiatives will be investigated.

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RECENT REGULATIONS

Proposed Rule to Register and Monitor Nonimmigrants

Noting that the post-September 11th world order necessitates broader registration requirements for nonimmigrant aliens from certain designated countries, and others who pose a national security or law enforcement risk, the Attorney General published a proposed rule on June 13, 2002, to monitor and register nonimmigrants. 67 *Fed. Reg.* 40581 (June 13, 2002)

The proposed rule would amend 8 CFR §§ 214 and 264 to require that such nonimmigrant aliens be fingerprinted and photographed, and that they provide more specific and detailed information upon arrival, thirty days after arrival, and every year thereafter in order to ensure compliance with the terms of their visas and timely departure upon visa expiration. Exception would be made for nonimmigrant aliens applying for admission under INA § 101(a)(15)(A) or § 101(a)(15)(G). In addition, the Attorney General and the Secretary of State could jointly exempt nonimmigrant alien classes, or individually exempt specific nonimmigrant aliens from these special registration requirements.

The special registration requirements would apply to a small percentage of individuals, namely those nonimmigrant aliens from countries specified through notification in the Federal Register, and "individual aliens whom the Attorney General or the Secretary of State, through officials of their departments, have determined should be monitored within the United States in order to promote the nation's security or law enforcement interests." The Attorney General will provide inspection officers at ports of entry with specific criteria for evaluating nonimmigrant aliens to assess their national security or law enforcement risk. When such officers have reason to believe that a nonimmigrant alien poses such a risk, that alien will be required to participate in supplemental registration in order to enter the United States.

Additionally, the Attorney General will have authority to require nonimmigrant aliens already in the United States to submit to the additional registration requirements upon notification in the Federal Register. Any change of address, employment, or educational institution must also be reported within 10 days. Finally, marking the first substantial use of departure control, the proposed rule will require nonimmigrant aliens to report actual departure to an immigration officer to ensure that such special registrations are properly closed.

The Attorney General will have authority to require nonimmigrant aliens already in the United States to submit to the additional registration requirements upon notification in the Federal Register.

EOIR Publishes Interim Rule Regarding Protective Orders

The Attorney General has published an interim rule, authorizing immigration judges to issue protective orders and seal records dealing with law enforcement or national security information. 67 *Fed. Reg.* 102 (May 28, 2002). Due to the post-September 11 national emergency declared in President Bush's Proclamation 7453, which justifies invoking the good cause exception of 5 U.S.C. §§ 553(b)(B) and (d)(3), the interim rule was implemented with provisions for post-promulgation public comment rather than proceeding through general notice and comment rulemaking.

This interim rule amends 8 CFR § 3.27 and 3.31, as well as adding 8 CFR § 3.46, to allow for the presentation of sensitive information such as grand jury information, evidence of organized criminal activity, and other sensitive information resulting from ongoing investigations into the threat from terrorism. According to Attorney General Ashcroft, "This regulation provides immigration judges and the Service (INS) with the flexibility to protect this information where necessary." Issuance of such orders is to be limited to those situations involving "an important and substantial government interest in safeguarding the public, and national security and law enforcement concerns."

Where a respondent, or his designated representative, violates a protective order, all opportunities for discretionary relief from removal are terminated. Furthermore, attorneys and other accredited representatives who fail to comply can be barred from appearing in all further proceedings before EOIR or the INS.

LIFE Act Rule Permitting Adjustment Of Status By Members Of Three Class Action Cases.

On June 4, 2002, the INS published a final rule implementing the legalization provisions of the Legal Immigration Family Equity (LIFE) Act. 67 *Fed. Reg.* 38341 (June 4, 2002). The legalization provisions of the LIFE Act provide a new opportunity for aliens who applied for relief under *Catholic Social Services, Inc. v. Ashcroft* (No. Civ. S-86-1343 LKK, E. D. Cal.), *Newman v. INS* (No. Civ. 87-4757-WDK, C.D. Cal.), and *Zambrano v. INS* (N. Civ. S-88-455 EJG, E.D. Cal., currently on appeal, 00-16191, 9th Cir.), to apply for adjustment of status to lawful permanent resident. The final rule extends the application period until June 3, 2003, and resolves concerns raised during the comment period that the interim rule did not cover all class members of the three cases, and that the eligibility standards for adjustment were more restrictive than those uner IRCA, the 1986 amnesty program on which the lawsuits are based.

by Jill Quinn, OIL Summer Intern

Ninth Circuit Issues General Order Governing Deportation Stay Motions in Petitions for Review

General Order 6.4(c)
Motions for Stay of Deportation or Removal in Petitions for Review
Effective July 1, 2002

(1) *Temporary Stay*

Upon the filing of a motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the court. A briefing schedule will not be set until the motion for stay is resolved. Any existing briefing schedule will be deemed vacated upon the filing of such a motion.

(2) *Supplemental Motion*

If the court determines that the motion or request for stay fails to discuss the merits of the petition for review and to identify the potential hardships faced by the petitioner due to deportation or removal during the pendency of the petition, an order will inform the petitioner of that determination and provide petitioner with the opportunity to file a supplemental motion for stay within 14 days from the filing of the order.

(3) *Response*

The respondent shall file its response to the request or motion within 42 days from filing of the original request or motion. The administrative record is due with the response. If the administrative record is not filed by the time the response is due, the respondent shall, at a minimum, include with its response a copy of the Board of Immigration Appeals' order if such order has not been provided by petitioner and the Immigration Judge's order if such order provides the primary basis for the Board's decision. Any dispositive motions respondent seeks to file are due at the same time the response is due.

(4) *Reply*

The petitioner may file a reply to the response within 7 days from service of the response.

(5) *Orders to Show Cause*

If the court determines that it may lack jurisdiction over the petition for review, an order will be issued directing the petitioner to show cause why the petition should not be dismissed for lack of jurisdiction. The time limits set forth in this rule will not apply and the order will establish the applicable time limits for responding to the order. The temporary stay will continue in effect pending resolution of the jurisdictional issue or until further order of the court.

> *"Upon the filing of a motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the court."*

(6) *Non-Opposition*

If respondent files a notice of non-opposition to the stay motion in lieu of the response provided for in subsection (c) above, the temporary stay shall continue in effect during the pendency of the petition for review or until further order of the court. If the respondent files a notice of non-opposition, the administrative record will not be due in accordance with subsection (c), and a new briefing schedule and due date for the administrative record will be established upon receipt of the notice of non-opposition.

(7) *Other Petitions for Review*

If a petition for review is filed without a request for a stay of deportation or removal, a briefing schedule shall be established upon the filing of the petition. The administrative record will be due 90 days from the filing of the petition rather than 40 days as provided in Fed. R. App. P. 15.

Note

Pursuant to this court's decision in DeLeon v. INS, 115 F.3d 643 (9th Cir. 1997), a final order of deportation or removal is automatically temporarily stayed upon the filing of a motion or request for stay of deportation or removal in a petition for review of such an order. This temporary stay is in effect whether or not the court issues an order confirming such stay. See id.

The court will not ordinarily issue such an order confirming the stay, although it may issue an order to show cause relating to jurisdictional questions or issues pertaining to the sufficiency of the stay request and/or the payment of fees. With regard to further briefing on the merits of the stay, petitioner may file a supplemental motion within 14 days. See Abbassi v. INS, 143 F.3d 513 (9th Cir. 1998).

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NOTED WITH INTEREST

The San Francisco *Recorder* reports that the Ninth Circuit Court of Appeals "has been hit with a flood of immigration appeals, clocking in at around 100 per week. The reasons are unclear — it's probably the result of efforts to clear immigration backlogs at the Justice Department -- but the potential for impact on court staff and the judges is not." If the current rate continues over the course of one year, immigration cases would comprise half of the court's docket. "The Attorney General has gone on record saying he wants to clear the backlog, so they're heading this way," Ninth Circuit Clerk Cathy Catterson was quoted as saying.

SUMMARIES OF RECENT BIA DECISIONS

Cancellation of Removal

In *Matter of Romalez-Alcaide*, 23 I&N Dec. 438 (BIA 2002), the *en banc* Board dismissed the respondent's appeal of a denial of cancellation of removal under section 240A(b). The Board found that "the respondent's two short departures from the United States in 1993 and 1994, both under threat of deportation, constituted breaks in the respondent's accrual of continuous physical presence for purposes of cancellation of removal." 23 I&N Dec. at 438. The Board reached its conclusion after reviewing the statutory language in the INA and NACARA, prior law, and Congressional intent as expressed in IIRIRA.

Board Member Pauley concurred. Board Member Rosenberg, joined by Board Member Espenoza, dissented.

Aggravated Felony

In *Matter of Small*, 23 I&N Dec. 448 (BIA 2002), the *en banc* Board sustained an INS appeal and remanded the case to the Immigration Judge. Writing for the majority, Board Member Pauley found that a conviction for misdemeanor sexual abuse of a minor was an aggravated felony under section 101(a)(43)(A). The respondent was convicted of sexual abuse in the second degree under New York Penal Law § 130.60 which criminalizes sexual contact between a person and a child younger than fourteen. The offense is punishable by imprisonment for one year or less. In its Notice to Appear, the INS alleged that the respondent was subject to removal as an alien who had been convicted of sexual abuse of a minor and a crime of violence (§ 101(a)(43)(F)). The Board quickly disposed of the crime of violence charge, noting that convictions under that section must be a felony offense.

The Board noted that three circuits had addressed the sexual offense issue since its decision in *Matter of Crammond*, 23 I&N Dec. 9 (BIA 2001), *vacated* 23 I&N 179 (BIA 2001). *Guerrero-Perez v. INS*, 256 F.3d 546 (7th Cir. 2001); *United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *United States v. Marin-Navarette*, 244 F.3d 1284 (11th Cir.), *cert. denied*, 122 S. Ct. 317 (2001). In addition, the Ninth Circuit alluded to its possible agreement with the other circuits. *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002). The Board then stated that "[w]e consider it appropriate at this juncture to accede to the weight of appellate court authority in the interest of uniform application of the immigration laws."

Board Member Grant concurred in the decision. Board Members Filppu, joined by Moscato, and Rosenberg, joined by Espenoza, dissented.

Cancellation of Removal

In *Matter of Blancas-Lara*, 23 I&N Dec. 458 (BIA 2002), a Board panel (PAULEY, Guendelsberger, Rosenberg) dismissed an INS appeal of a grant of cancellation of removal. The only issue was whether, in calculating the period of continuous residence required by section 241A(a)(2), the respondent was entitled to count the time following his initial admission as a nonimmigrant. The respondent was initially admitted with a border crossing card and later adjusted his status to that of a lawful permanent resident. The INS argued that the time prior to admission as a lawful permanent resident could not be included in the continuous physical residence calculus. The Board relied on the "plain meaning of the statutory language" to find that the respondent had met the continuous residence requirement.

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The Foreign Student Tracking System – SEVIS

Attorney General Ashcroft has announced that the first piece of an automated foreign student tracking system will be operational on July 1, 2002. The $38 million Student and Exchange Visitor Information System, or SEVIS, will link INS, the Department of State, and the Department of Education with approximately 74,000 U.S. colleges, universities, and trade schools, allowing for Internet-based exchange of foreign student information. This centralized, rapid-access reporting system will ultimately record the arrival, address, major, any withdrawal or expulsion, and any disciplinary action taken against one of the more than one million foreign students currently visiting the United States for educational purposes.

According to the Attorney General, "rapid access to current complete information on foreign students will improve dramatically the INS's capability to enforce immigration laws and keep track of this group of noncitizens in the United States." The system is also expected to reduce student visa fraud, since unused paper forms that were previously issued to collect necessary information, and often subject to theft and resale for fraudulent visa applications, will now be cancelled, removing them from circulation.

As of July 1, the system will be available to educational institutions on a voluntary basis, with mandatory use to become effective on January 1, 2003. It replaces what the Attorney General described as a "slow, antiquated, paper-driven reporting system incapable of ensuring that those who enter the United States as students are in fact attending our educational institutions."

Once it is fully operational, SEVIS will require educational institutions to record any changes to a foreign student's status within 24 hours.

Summaries Of Recent Federal Court Decisions

ASYLUM

■Ninth Circuit Reverses BIA's Adverse Credibility Finding In Asylum Case Where Airport Interview Was Unreliable

In ***Singh v. INS***, __F.3d__, 2002 WL 1271524 (9th Cir. June 10, 2002) (*McKeown*, Rymer, Kleinfeld), the Ninth Circuit reversed the BIA's adverse credibility determination, which had been based on inconsistencies between petitioner's testimony and the information he provided during a post-arrival airport interview.

Petitioner, a Punjabi-speaking native and citizen of India, was interviewed immediately upon his arrival at JFK Airport in 1993, using an unofficial, "outside translator" who spoke Hindi, a language petitioner claimed he could understand "a little." The court noted that "the English-Hindi-Punjabi-Hindi-English round robin that occurred there begins to take on the patina of the children's game of 'telephone.'" Additionally the court noted possible explanations for the discrepancies, such as how the interview was conducted, fear of the interrogation setting, and any adverse motives the "outside translator" may have had, such as refusal to provide accurate translation without a bribe. The court, however, did emphasize that when petitioner was asked what would happen to him if he was returned to India, he stated "I will be shot." Citing *INS v. Elias-Zacarias*, 502 U.S. 478, which requires consideration of the entire record, the court found that the airport statement "lacks sufficient indicia of reliability and accuracy on its own" to meet the burden of substantial evidence required on review.

The court found that because the BIA had provided no reason for disbelief of petitioner's accounts there was insufficient support for an adverse credibility finding.

The court also looked to the BIA's reasons for discounting petitioner's testimony regarding his arrests in March and September of 1992, and found that because the BIA had provided no reason for disbelief of petitioner's accounts there was insufficient support for an adverse credibility finding. Finally, the court declined to consider the merits of petitioner's claim due to the fact that they had not been sufficiently examined by the BIA.

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■Ninth Circuit Holds That Alien Threatened Over The Telephone By Peruvian Guerrillas Is Entitled To Asylum

In ***Cardenas v. INS***, __F.3d__, 2002 WL 1286076) (9th Cir. June 12, 2002) (*Reinhardt*, Hunt; Graber dissenting), the Ninth Circuit reversed the BIA's denial of asylum and withholding to a Peruvian who claimed he and his family would be persecuted by the Shining Path despite attempts to relocate from their hometown of Lima, based on a threatening message left on his answering machine.

Petitioner, who was employed by a merchant shipping company, and his family were targeted by the Shining Path because they suspected him of being a government informant. After a number of written death threats and graffiti slogans painted on the family home, he agreed to use his position to assist in transporting medicine and supplies. After a request to transport explosives, petitioner fled to the United States for a short time, and was greeted with death threats upon his return. He ultimately decided to move away from Lima with his family. After six months, he returned to Lima and found a message on his machine stating ,"[We] [are] getting close to [you] and either way [we] [are] going to get [you.]." At this point, petitioner and his family left for the United States where they applied for asylum.

The BIA's determination was based on the fact that the petitioner did not show that his fear of persecution existed country-wide. Upon review, however, the Ninth Circuit found that the BIA had failed to adequately consider the final phone threat, which occurred when petitioner returned to Lima after a six-month absence, and in combination with the other evidence "compels the conclusion that petitioner met his burden under the law of showing that he could not safely relocate within Peru." Because the BIA's decision was based solely on petitioner's ability to relocate the court granted the petition for review and remanded the case to the BIA for further proceedings.

In a dissent, Circuit Judge Graber criticized the majority's reliance on a single telephone message to justify the finding of a well-founded fear of persecution. Judge Graber pointed out that "the majority resolves every ambiguity in favor of the petitioner, whereas our standard of review requires us to resolve every ambiguity in favor of the decision-maker below."

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■Fifth Circuit Finds Asylum Claim to be Frivolous

In ***Efe v. Ashcroft***, __F.3d__, 2002 WL 1209955) (5th Cir. June 20, 2002) (*Clement*, Politz, Stewart), the Fifth Circuit affirmed the BIA's denial of asylum, withholding of removal, and CAT relief. The court also agreed with the BIA's finding that petitioner's claim was frivolous due to gaping inconsistencies in petitioner's statements.

The petitioner, a Nigerian citizen

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Summaries Of Recent Federal Court Decisions

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who entered the United States in January 1998, claimed persecution based on political opinion, alleging that he had been beaten at a political demonstration in 1997. Upon arrival to the United States, he was deemed to have a credible fear of persecution. However, during proceedings, he was vague about his age and birth date, which was interpreted as an attempt to mislead the court. Additionally, petitioner relayed alternating versions of the events following the beating, but admitted to stabbing and killing a police officer, in one instance with a bottle he found on the ground, and in another with a knife he obtained from his home.

Petitioner's testimony regarding the events that preceded his arrival in the United States changed with each presentation, providing substantial evidence for the denial of relief and the frivolous claim determination.

The IJ found petitioner statutorily barred from asylum or withholding of removal under INA § 208(b)(2)(a)(3)(i) because the murder of the police officer constituted a serious nonpolitical crime. Because CAT relief was not available at that time, petitioner's case was later remanded to the immigration court to determine his eligibility, and he was denied withholding of removal but granted deferral of removal. However, the BIA remanded the cases again, due to an INS motion to reopen and remand, based on previously unavailable material evidence. The evidence relied on was a State Department wire detailing the lack of success in investigating information provided by petitioner regarding his name and the area he claimed he was from, which called petitioner's credibility into question.

At a new hearing on the merits, the IJ denied all forms of relief, ruling that petitioner "had neither presented a plausible, coherent account of the basis for a well-founded fear of persecution, nor established that he was a victim of persecution." Furthermore, the IJ held that his application for asylum was frivolous due to his knowing and intentional false statements both on his application and during his testimony. The BIA then denied petitioner's appeal, noting that the State Department wire was not the sole basis for the adverse credibility determination. Petitioner then appealed.

The Fifth Circuit held that the BIA's grant of the INS motion to reopen and remand based on the State Department wire was not in error, noting that it "potentially contained information directly related to the case and thus was worth considering." The court also noted that petitioner's testimony regarding the events that preceded his arrival in the United States changed with each presentation, providing substantial evidence for the denial of relief and the frivolous claim determination.

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■Second Circuit Affirms BIA's Denial Of Asylum Despite BIA's Summary Analysis, And Holds That BIA's Failure To Sua Sponte Reopen Does Not Violate Due Process.

In ***Liao v. DOJ***, __ F.3d__, 2002 WL 1358176 (2d Cir. June 20, 2002) (Oakes, *Cardamone;* Jacobs (concurring)), the Second Circuit held that despite the BIA's ambiguous and cursory explanations for its denial of the Chinese alien's asylum application, the BIA's underlying opinion contained sufficient rationale for the court to affirm.

The petitioner came to the United States from China in 1991. He was apprehended when he tried to escape from the inspection area and placed in exclusion proceedings. He had applied for asylum at the time he was apprehended claiming fear of persecution based on China's one-baby policy. When he failed to appear at his exclusion hearing he was ordered excluded in absentia. Subsequently he moved to reopen and for a change of venue. His motion was granted. He changed his asylum application claiming he had been persecuted with fines and confiscation of his home for sheltering a cousin who violated the birth control policy. The IJ denied relief based on *Matter of Chang*. While his case was pending on appeal at the BIA, Congress enacted IIRIRA which modified the definition of political opinion to overrule *Chang*. The BIA affirmed finding that petitioner's evidence did not establish persecution or a well-founded fear of persecution.

The Court held that fines by the Chinese authorities did not amount to economic persecution, and that notice to the alien to attend a birth control class was not a threat. The court held that it could not, "on these facts, if at all," direct the BIA to sua sponte reopen the record and remand the case so that the alien might submit additional evidence, and that the BIA's failure to do so did not violate due process.

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■Tenth Circuit Concludes That Reliance On Country Reports Was Insufficient To Establish Changed Conditions

In ***Krastev v. INS,*** __F.3d__, 2002 WL 1313170 (10th Cir. June 17, 2002) (Ebel, McKay, *Briscoe*), the Tenth Circuit reversed BIA's denial of asylum to Bulgarian applicants. The petitioners sought asylum in their deportation proceedings based on mistreatment in Bulgaria for political activities, both during the communist regime and after by the actions of local government officials not controlled by the central government. The IJ found their testimony not credible and denied relief. The BIA, accepting as true their testimony, denied relief on the basis of changed circumstances in Bulgaria, relying on the State Department Country Conditions Report of 1995. The BIA found

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no basis for humanitarian asylum and no showing of a clear probability of persecution.

The court held that the BIA erred in finding that State Department evidence of changed country conditions in Bulgaria rebutted the presumption of a well-founded fear of persecution. The court noted that petitioners had submitted evidence indicating that they were still subject to persecution for their views at the local level by certain former communist government officials and by groups under their control.

The "BIA's conclusory reliance on the Country Report reflects no consideration of the individualized circumstances facing petitioners."

Therefore, to rebut this presumption of future persecution, the INS was required to show that conditions in Bulgaria had changed to such an extent that the petitioners' fear of persecution from local officials was no longer well-founded. The INS did not rebut this information. Instead, the court noted that the 1995 Country Report was overwhelmingly favorable to petitioners' claims. Accordingly, the court found that the "BIA's conclusory reliance on the Country Report reflects no consideration of the individualized circumstances facing petitioners."

The court remanded the case to the BIA to determine whether the aliens' evidence of past persecution is credible and gives rise to a presumption of a well-founded fear of persecution, and if so, to consider whether this presumption is rebutted by evidence that petitioners could avoid future persecution by relocating to another part of Bulgaria.

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CITIZENSHIP

■Ninth Circuit Holds That Residency Requirement Is Satisfied By Evidence Of Physical Presence In The United States For Seasonal Employment

In ***Alcarez-Garcia v. Ashcroft***, __F.3d__, 2002 WL 1339122 (9th Cir. June 20, 2002) (*Hall*, W. Fletcher; Kozinski, dissenting), the Ninth Circuit, reversed the BIA's determination that petitioner's father did not meet the residency requirement under 8 U.S.C. § 601(g)(1940), which provides for derivative citizenship to a person born outside the United States if one parent is a U.S. citizen who has had ten years of residence in the United States prior to the person's birth. The court held that the objective evidence of seasonal employment favored finding that petitioner's United States citizen father was physically present in the United States for nine months out of nearly every year during the relevant period. The court also found that the fact that petitioner's father lived and worked in the United States for the majority of his life during the relevant period, demonstrated that the United States was his "principal place of dwelling."

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CRIMES

■Ninth Circuit Holds that IJ's Use of Pre-Sentence Report to Determine Nature of Alien's Conviction was Justified

Finding that the IJ did not erroneously rely on a pre-sentence report to determine whether the alien's conviction constituted an aggravated felony, the Ninth Circuit, in ***Abreu-Reyes v. INS***, ___F.3d___, 2002 WL 1271537 (9th Cir. June 10, 2002) (*King*, O'Scannlain; dissenting Paez), denied a petition for review of her equal protection challenge due to lack of jurisdiction.

Because the judgment contained in the record before the IJ did not indicate the amount of loss to the government resulting from petitioner's fraud conviction, the IJ turned to the pre-sentence report to determine whether loss to the victim exceeded $10,000, constituting an aggravated felony. Petitioner challenged the report's use, arguing first that it was not part of the record of conviction, and second that it constituted hearsay. In countering petitioner's first argument, the Ninth Circuit noted that the report "falls into the category of documents that constitute proof of the nature of the alien's criminal conviction" as required by 8 C.F.R. § 3.41. Furthermore, the court found that the report met the two part test for admissible hearsay in removal proceedings, requiring that such statements be probative, and that their use be fundamentally fair.

Petitioner next challenged the fact that her crime constituted an aggravated felony. The court noted that "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43)(m)(i) as an offense involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000." The estimated loss identified in the pre-sentence report was $37,546. Furthermore, the court pointed to the Supreme Court's recent statement in *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2276 n. 4 (2001), that there has always been an expansive definition of the term "aggravated felony." Therefore, the court had no jurisdiction over petitioner's equal protection challenge, claiming that her ineligibility for discretionary relief from removal was unconstitutional, and denied her petition for review.

In dissent, Judge Paez pointed to the lack of any evidence the INS sought release of the pre-sentence report from the district court, as required by *United*

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States v. Schlette, 842 F.2d 1574 (9th Cir.), amended 854 F.2d 359 (9th Cir. 1988). Furthermore, the dissent emphasized the uncertainty regarding the district court's reliance on the pre-sentence report in making its sentencing determination due to a lack of information contained in the administrative record.

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■Third Circuit Holds That Conviction For Harboring An Alien Is An Aggravated Felony

In ***Patel v. Ashcroft***, __F.3d__, 2002 WL 1343553 (3d Cir. June 20, 2002)(*McKee*, Barry, Alarcon (by designation)), the Third Circuit dismissed the alien's petition for review challenging the BIA's decision that his conviction for harboring an alien under 8 U.S.C. § 1324(a)(1)(A)(iii) was an aggravated felony. The court concluded that 8 U.S.C. § 1252(a)(2)(C) provided jurisdiction to review the alien's claim that he was not removable. However, the court agreed with the BIA (and every other court of appeals to consider this issue) that 8 U.S.C. § 1101(a)(43)(N), which renders any offense described in 8 U.S.C. §§ 1324(a)(1)(A) and (2) an aggravated felony, was not limited by the parenthetical description "relating to alien smuggling." The court agreed that the parenthetical was merely descriptive and that harboring an alien was an aggravated felony.

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■Third Circuit Holds That Statute Does Not Violate Equal Protection And That Receipt Of Stolen Property Is A Crime Of Moral Turpitude.

In ***Deleon-Reynoso v. Ashcroft*** __ F.3d__ (3d Cir. June 11, 2002) (Nygaard, Alito, and *Rosenn*), the Third Circuit affirmed the district court's denial of a petition for a writ of habeas corpus. The alien, a lawful permanent resident, was convicted of receiving stolen property. The court held that INA § 212(h) does not violate equal protection even though non-LPRs can seek the 212(h) waiver of inadmissibility, whereas LPRs cannot. The court held that the Pennsylvania statute under which the alien was convicted required that he believe the property was "probably" stolen, and was adequate to constitute a crime of moral turpitude.

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■Second Circuit Holds That Equal Protection Is Not Violated Because Lawful Permanent Residents Who Are Aggravated Felons Cannot Seek A Waiver Of Inadmissibility

In *Jankowski-Burczyk v. INS*, 2002 WL 1066630 (2d Cir. May 29, 2002) (*Jacobs*, Kearse, Jones), the Second Circuit reversed a district court's ruling and held that INA § 212(h), does not violate equal protection by permitting aliens who are aggravated felons and not lawful permanent residents (LPRs) to seek a waiver of inadmissibility, while denying the same form of relief to aggravated felon LPRs

The court found that Congress may have viewed the commission of aggravated felonies by LPRs as an abuse of the greater privileges and opportunities given to LPRs, and that LPRs may be at a higher risk for recidivism.

In 1983, petitioner came to the United States from Poland, receiving refugee status at age seven, and obtaining LPR status in 1985. In 1999, she pled guilty to federal bank larceny and was deemed removable under INA § 237 (a)(2)(A)(iii). After the determination was affirmed by an IJ and the BIA, the petitioner filed a *pro se* motion for writ of *habeas corpus*, raising an equal protection challenge. The district court granted the writ finding a violation of equal protection since non LPRs were eligible for such relief.

Noting that, "the premise of the district court opinion is that the disparity between the treatment of 'similarly situated non-LPR's and LPRs' is irrational," the Second Circuit questioned "whether LPR's and non-LPR's are similarly situated to begin with," noting that "the INA treats them differently in a host of ways, of which § 212(h) is just one and far from most important." In analyzing the amendments to § 212(h), the court found that Congress may have viewed the commission of aggravated felonies by LPRs as an abuse of the greater privileges and opportunities given to LPRs, and that LPRs may be at a higher risk for recidivism. On the other hand, the lower court's reasoning implied that there should be a systematic disadvantage to non-LPR's under the INA.

The court concluded that, even if LPRs and non-LPRs were similarly situated, Congress' goals in treating them differently under the statute are rational.

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JURISDICTION

■Second Circuit Joins Third In Finding That District Courts Retain Jurisdiction To Review Final Orders Of Non-criminal As Well As Criminal Aliens

In ***Luka Liu v. INS*** , __ F.3d__ , 2002 WL 1174385 (2d Cir. June 4, 2002) (Van Graafeiland, Winter, *Sack*), the Second Circuit reversed the district court's dismissal of the alien's *habeas*

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petition for want of subject matter jurisdiction. The district court had held that it could not review the final order of a non-criminal under *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Henderson v. INS*, 157 F.3d 106, 117 (2d Cir. 1998) (involving criminal aliens' removal orders). The Second Circuit held that *St. Cyr* found that the Antiterrorism and Effective Death Penalty Act of 1996 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 lacked a "clear statement of congressional intent to repeal habeas jurisdiction." In concluding that the district courts retain jurisdiction to review the final orders of non-criminal as well as criminal aliens, the Second Circuit joined the Third Circuit in *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001).

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MOTION TO REMAND

■Seventh Circuit Addresses Issue of Post-Final Determination Motion to Remand

In ***Krougliak v. INS,*** 289 F. 3d 457 (7th Cir. May 7, 2002) (*Flaum*, Harlington Wood, Jr., Posner), the Seventh Circuit affirmed the BIA's decision denying petitioner's motion to reopen, agreeing that he failed to establish that the information presented was previously unavailable. Additionally, in addressing an issue of first impression, the court also found that the BIA properly treated petitioner's motion to remand, filed during the pendency of his motion to reopen, as a motion to reopen. Therefore, since it was filed more than 90 days from the final decision, rendered in 1998, it was untimely.

Petitioner entered the United States in 1991, claiming persecution as a "Greek Catholic" in the Ukraine, and immediately filed an application for asylum. His initial asylum application, and the renewed application made at his deportation hearing, were denied on appeal in 1995 and 1997 respectively. Petitioner then filed a *pro se* appeal. During its pendency he requested advanced parole to visit his ailing mother in France. The request was denied. The appeal was also denied in 1998, and a final order of deportation was issued. Finally, petitioner filed a motion to reopen, claiming he had new evidence to present that was previously unavailable. While this appeal was pending, petitioner filed a motion to remand for adjustment of status based on his wife's receipt of citizenship.

Reviewing his motion to reopen for abuse of discretion, the Seventh circuit held that "the evidence he wished to present was neither new nor previously unavailable." While petitioner argued that the evidence in question was in the hands of his mother at the time of his asylum hearing, the court noted that when he requested advanced parole, he "failed to mention that his mother was in possession of documents that could be helpful to his asylum application." Furthermore, in response to petitioner's assertion that his mother refused to give him the document, fearing that she would not see him again if he were granted asylum, the court pointed to other documents obtained through various means from the Ukraine, ultimately holding that the evidence was not, in fact, previously unavailable.

In addressing petitioner's motion to remand, the court noted the Fifth Circuit's approval of the BIA's reasoning in *Matter of L-V-K, Interim Decision 3409*, and ultimately followed suit, noting that "procedurally it would be impossible to remand a case that had been closed."

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TERRORISM

■D.C. Circuit Upholds Designation By The Secretary Of State Of Foreign Terrorist Organizations

In ***32 County Sovereignty Committee v. Department of State,*** __F.3d__, (D.C. Cir. June 14, 2002) (*Randolph*, Ginsburg, Tatel), the D.C. Circuit upheld designations by the Secretary of State under the Antiterrorism Act of 1996 of several entities operating as parts of the Real IRA, a dangerous foreign terrorist group. At the request of the British and Irish governments, the Secretary had designated the Real IRA as a Foreign Terrorist Organization under the Act. At the time, the Secretary determined that several other Irish political entities, including the 32 County Sovereignty Committee, were acting as aliases of the Real IRA and conducting fundraising in the United States. The Secretary therefore designated these associated organizations as well. As permitted by statute, these entities challenged their designations directly in the D.C. Circuit.

The D.C. Circuit rejected their contentions that they had not been afforded due process rights, and that the Secretary had not acted reasonably in relying almost exclusively on intelligence information provided by the British and Irish governments. The court found first that, even though these entities have members who operate in the United States on their behalf, raising money, these foreign organizations themselves do not have a sufficient presence in this country to bring them within the protections of our Constitution. The court thus held that these entities cannot claim rights under the Due Process Clause, and must instead rely on the procedures Congress has granted them in the statutory scheme. The court also held that the Secretary had acted within his power in relying heavily upon information provided by foreign intelligence and security services, and it thus upheld the designations.

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CASES SUMMARIZED IN THIS ISSUE

NOTED

"The Justice Departments Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily — arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC — is within the inherent authority of the states. "

Attorney General Ashcroft – June 6, 2002

INSIDE OIL

A warm welcome to new OIL Trial Attorneys **Deborah N. Misir** and **Jamie Dowd.**

Ms. Miser is a graduate of the University of Chicago where she obtained a B.A. and a M.A. in Political

Science. She obtained her Juris Doctor from the University of Minnesota Law School. Ms. Miser joined the U.S. Marine Corps Judge Advocate General Corps after graduation. She subsequently joined EOIR and in June 1999, transferred to the INS Office of the General Counsel as an Associate General Counsel.

Ms. Dowd is a graduate of the University of North Carolina and the University of Miami School of Law. Ms. Dowd was a Summer Law Clerk at OIL in 2001. She joins OIL through

the Department of Justice Honors Program.

On June 3-7, 2002, Senior Litigation Counsel, **Francesco Isgro** and Trial Attorney **Mary Jane Candaux** traveled to Myrtle Beach, South Carolina, to join the faculty at the INS's Annual Experienced Attorney Training. On June 11, 2002, OIL Deputy Director **David McConnell**, Senior Litigation Counsel **Julia Doig**, and Trial Attorneys **Anthony Nicastro** and **Heather Phillips** traveled to New Orleans, and Oakdale, Louisiana where they provided training to government attorneys, court personnel, and INS deportation officers.

The goal of this monthly publication is to keep litigating attorneys within the Department of Justice informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at https://oil.aspensys.com. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at francesco.isgro@usdoj.gov. The deadline for submission of materials is the 20th of each month. Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.

Office of Immigration Litigation

"To defend and preserve the Attorney General's authority to administer the Immigration and Nationality laws of the United States"

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